IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.1437 OF 2006

Mathew John Gudinho ...Appellant
Vs.
The Municipal Corporation of
Greater Bombay ...Respondent

Shri Deepak Trivedi for the Appellant.
Shri J.J. Xaveir for the Respondent.

CORAM : A. S. OKA, J.
DATE : JULY 24, 2006.

P.C.:

1. Admit. Shri Xavier for the Respondent waives service. Taken up for hearing forthwith.

2. The Appellant is the original Plaintiff. The suit filed by the Appellant for declaration and injunction has been dismissed by the learned Judge of the City Civil Court, Mumbai. The challenge in the suit was to a notice under section 351 of the Bombay Municipal Corporation Act, 1888 and the order passed by the Assistant Municipal Commissioner of demolition of the suit structure on the basis of the said notice.

3. The learned Counsel appearing for the Appellant apart from his other submissions on merits submitted that the Advocate appearing for the

Appellant was allowed to withdraw his appearance and therefore the Appellant could not lead further evidence and could not cross-examine the witness examined by the Respondent-Corporation. He submitted that the Appellant was desirous of examining only one more witness namely the Assistant Accessor and Collector of the Respondent-Central Ward, Municipal Office, Borivali and he desired to produce the assessment extracts of the suit structure. He submitted that as the Appellant was not given an opportunity to lead further evidence, the decree deserves to be set aside and order of remand may be passed. Shri Xavier appearing for the Respondent opposed the submissions by pointing out that sufficient opportunity was made available to the Appellant to lead evidence and due to the default on the part of the Appellant further evidence could not be led.

4. I have considered the submissions made by the learned Counsel appearing for the parties. I have perused the roznama of the suit which is a part of the Appeal compilation. On 16th August, 2005 the Appellant filed affidavit of examination-in-chief of

his constituted attorney. On the same date the Appellant also filed original documents alongwith a list. On some subsequent dates though the Appellant was absent, his constituted attorney was present. Thereafter on some of dates the Appellant remained present. On 18th January, 2006, 02nd February, 2006, 21st February, 2006 and 02nd March, 2006 the Appellant was absent. On 02nd March, 2006 the learned Trial Judge recorded in the roznama that a letter sent by the Advocate appearing for the Appellant through courier has returned back unserved with the remark that the Appellant was not available at the address. The learned Trial Judge allowed the Advocate to withdraw his appearance and closed the evidence of the Plaintiff.

5. It must be noted here that the letter which is send by the Advocate appearing for the Plaintiff was not sent by Registered Post A.D., but it was purportedly send by a courier service. Sub-rule 4 of Rule 8 of the Rules framed by this Court under section 34(1) of the Advocates Act, 1961 mandates that when an Advocate who has filed a vakalatnama for a party wishes to withdraw his appearance, he shall serve

written notice of intention to do so to the client atleast seven days in advance of the case coming up for hearing before the court. In the present case, the learned Trial Judge before allowing the Advocate to withdraw his appearance should have ensured that an attempt is made by the Advocate to send intimation to the Appellant by post. This was not a case where the Appellant was negligent right from the beginning. The Appellant had led evidence and had produced the documents. The constituted attorney of the Appellant was cross-examined by the Advocate appearing for the Respondent. The learned Judge closed the evidence of the Appellant on the same day on which he allowed his Advocate to withdraw his appearance.

6. Considering the facts and circumstances of the case, I am of the opinion that one more opportunity deserves to be granted to the Appellant to lead further evidence. The Appellant has tendered an affidavit today which is taken on record and marked "X" for identification. The Appellant has stated that he wants to examine only one witness namely the Assistant Accessor and Collector of R/Central Ward, Borivali and he desires to produce the extract

assessment record. Therefore, a case is made out for passing an order of remand.

7. Hence, I pass the following order:

(i) The impugned Judgment and Decree is set aside.

(ii) L.C. Suit No.2727 of 2001 is restored. The parties are directed to appear before the learned Trial Judge on 14th August, 2006 at 11.00 a.m.

(iii) The Appellant is permitted to examine the Assistant Accessor and Collector of R/Central Ward, Borivali and is permitted to produce the extracts of the assessment record.

(iv) After aforesaid evidence is led by the Appellant, the Respondent will make available its witness Shri K.R. Bhuta for cross-examination by the Advocate for the Appellant. The Respondent-Corporation will be free to lead further evidence in the suit.

(v) The learned Trial Judge will decide the suit as expeditiously as possible and in any event on or before 31st January, 2007.

(vi) It is made clear that both the parties will not be given any notice of the date fixed before the Trial Court and they will appear before the Trial Court on 14th August, 2006 at 11.00 a.m.

(vii) The interim order which is operating during the pendency of the suit is restored.

(viii) Appeal is partly allowed in above terms with no orders as to costs.

(ix) Parties and concerned court to act upon an authenticated copy of this order. Writ to be sent immediately by hand.

JUDGE